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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DAVID PAZ, an individual and on behalf of all others similarly situated, Plaintiff, vs. PLAYTEX PRODUCTS, INC., a Delaware Corporation, and DOES 1 through 100, inclusive, Defendants.	CASE NO. 3:07-cv-2133-JM-BLM **CLASS ACTION** **MEMORANDUM OF POINTS OF AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION TO REMAND FOR LACK OF SUBJECT MATTER JURISDICTION** ACCOMPANYING DOCUMENTS: Notice of Motion and Motion; Evidentiary Objections to Declaration of Brenda Liistro; Objections To and Request For An Order Striking Submission of Unrelated Decision **[28 U.S.C. § 1447]** Date: December 14, 2007 Time: 1:30 p.m. District Judge: Hon. Jeffrey T. Miller Room/Floor: Room 16 / 5th Floor **[NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT]**

Plaintiff DAVID PAZ ("Plaintiff") hereby submits this Memorandum of Points and Authorities in Support of the Motion to Remand for Lack of Subject Matter Jurisdiction.

I. INTRODUCTION

Plaintiff respectfully requests that this Court remand the above-entitled action to the

Superior Court of the State of California, County of San Diego because defendant PLAYTEX PRODUCTS, INC. ("Defendant") failed to establish to a "legal certainty" that federal subject matter jurisdiction exists in this case. In particular, Defendant has failed to establish that the amount in controversy exceeds $5,000,000 exclusive of interests and costs.

II. PROCEDURAL BACKGROUND

On or about September 28, 2007, Plaintiff filed a proposed Class Action Complaint ("Complaint") in the Superior Court of California, County of San Diego for damages and injunctive relief against Defendant. See Complaint (Case No. 37-2007-00075921-CU-BT-CTL) attached to Notice of Removal as Exhibit "1," on file herein. The Complaint asserts three causes of action predicated on violations of *California* law: (1) Violation of Consumers Legal Remedies Act (California Civil Section 1750 *et seq.*); (2) Violation of California's Unfair Competition Law (California Business & Professions Code Section 17200 *et seq.*); and (3) Violation of California's False "Made In USA" Designation Statute (California Business & Professions Code Section 17533.7). All causes of action arise from Defendant's unlawful claims that its spill proof cups are "Made in the USA."

On or about October 9, 2007, Defendant was served with a copy of the Summons and Complaint. See Notice of Removal, Page 2, ¶ 2, Lines 5-6, on file herein.

On or about November 7, 2007, Defendant filed a Notice of Removal, and the case was assigned to the Hon. Jeffrey T. Miller (Case No. 3:07-cv-2133-JM-BLM).

III. LEGAL ANALYSIS

A. Legal Standard

"A civil action in state court may be removed to federal district court if the district court had 'original jurisdiction' over the matter." *Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 997 (9th Cir. 2007) (quoting 28 U.S.C. § 1441(a)). The Class Action Fairness Act of 2005 ("CAFA"), codified in relevant part at 28 U.S.C. §§ 1332(d) and 1453(b), provides that federal courts have "original jurisdiction" only where there is diversity of citizenship, the action is between citizens of different states, and the amount in controversy exceed $5,000,000, exclusive of fees and costs. 28 U.S.C. § 1332(d).

B. Defendant Has the Burden to Establish Removal Jurisdiction Pursuant to the Class Action Fairness Act

The Ninth Circuit Court of Appeals has held that the burden of establishing removal jurisdiction is on the proponent of federal jurisdiction. *Lowdermilk*, 479 F.3d at 997; *see Serrano v. 180 Connect, Inc., et al.*, 478 F.3d 1018 (9th Cir. 2007). As Defendant is the proponent of federal jurisdiction in this case, it has the burden of establishing jurisdiction. As set forth in detail below, Defendant has failed to establish that this Court has jurisdiction over this case. Therefore, Plaintiff respectfully submits that this Court has no subject matter jurisdiction over this matter and this case should be remanded back to state court.

C. Defendant Has the Burden to Establish To A "Legal Certainty" That the Amount in Controversy Exceeds $5,000,000

Federal courts are courts of limited jurisdiction, which strictly construe their own jurisdiction. *Lowdermilk*, 479 F.3d at 998. It is also well established that the plaintiff is the "master of her complaint" and can "plead to avoid federal jurisdiction" *Id.* at 998-99. Thus, in cases such as this where the damages sought by plaintiff appear from the four corners of the complaint to be less than the jurisdictional amount, the defendant seeking removal "must not only contradict the plaintiff's own assessment of damages, but must overcome the presumption against federal jurisdiction" by showing plaintiff is legally certain to recover at least five million dollars. *Id.* at 999.

In adopting "legal certainty" as the standard of proof, the *Lowdermilk* court expressly guarded the presumption against federal jurisdiction and preserved the plaintiff's prerogative, subject to the good faith requirement, to forgo a potentially larger recovery to remain in state court. *Id.*

Mere allegations that the matter in controversy exceeds the jurisdictional requirement do not overcome the strong presumption against removal jurisdiction nor satisfy defendant's burden of establishing the amount in controversy. *See Gaus v. Miles*, 980 F.2d 564, 567 (9th Cir. 1992) (finding that defendant's bald recitation that the amount in controversy exceeded $50,000 without identifying any specific factual allegations or provisions in the complaint that might

support that proposition, provoked *sua sponte* remand).

Moreover, the longstanding rule that a defendant bears the burden of proof to establish the amount in controversy, recognized in all of the Federal Circuits, continues to apply after the passage of CAFA. *See Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d 676 (9th Cir. 2006); *Rogers v. Central Locating Service, Ltd.*, 412 F.Supp.2d 1171 (W.D. Wash. 2006). In *Abrego Abrego*, the Ninth Circuit Court held that CAFA did not shift the burden of establishing that there is no removal jurisdiction to the party contesting removal, but instead held that the burden remained on the party seeking removal. *Id.* at 678. The court noted that in cases removed from state court, the removing defendant has "always borne the burden of establishing federal jurisdiction, including any applicable amount in controversy requirement." *Id.* at 682-83.

In this case, it is facially apparent from the Complaint that Plaintiff alleges a specific amount of damages. Plaintiff alleges that the "amount in controversy as to Plaintiff (individually) or any other individual Class Member does not exceed the value of the spill proof cups, which has an average retail price of approximately $6.99. Plaintiff purchased two spill proof cups; as such, the amount in controversy as between Plaintiff and Defendants as to Plaintiff's *individual* claims does not exceed $13.98. The amount in controversy as to all Class Members, inclusive of attorneys' fees and costs, injunctive relief (to the extent it can be valued), prejudgment interest, and punitive damages does not exceed $4,999,000." Complaint, ¶ 16. As such, Defendant must prove that Plaintiff is legally certain to recover at least $5,000,000 to meet this standard.

Defendant falls short of this standard as it has not produced any evidence showing it is "legally certain" that the amount in controversy in this action exceeds $5,000,000, including the legal certainty as it relates to the recovery of attorneys' fees and injunctive relief sought in the Complaint. *See Lowdermilk*, 479 F.3d at 1000 (attorneys' fees); *Sanchez*, 102 F.3d at 405 (injunctive relief). Defendant simply elected to present a two-page declaration on the critical issue, which Plaintiff objects to in pertinent part, which claims that "[b]ased on this allegation by Plaintiff, and Playtex's sales figures described above, the retail sales of those cups in California well exceed $5,000,000 for that 12 month period." Declaration of Brenda Liistro of in Support

of Defendant Playtex Products, Inc.'s Notice of Removal, ¶ 2, lines 8-10. Defendant's calculations are conclusory, unsupported by any admissible evidence, and do not accurately reflect the measure of damages in this case.

As fully set forth below, Defendant fails to satisfy its burden of proof establishing to a "legal certainty" that the amount in controversy exceeds $5,000,000 pursuant to the CAFA analysis. Therefore, Plaintiff respectfully submits that this Court has no subject matter jurisdiction over this matter and this case should be remanded back to state court.

D. This Court Lacks Subject Matter Jurisdiction as the Amount in Controversy Does Not Exceed $5,000,000

Defendant claims that CAFA applies in this case because the amount in controversy exceeds $5,000,000, exclusive of interest and costs. Specifically, Defendant argues that "Playtex sold approximately 1,300,000 spill proof cups in California with some form of a "Made in U.S.A." label" and that "[b]ased on Plaintiff's allegation in the Complaint concerning the average retail price of the cups, and Playtex's sales figures described above, the retail sales of those cups in California for the 12 month period described above well exceeds $5,000,000." Notice of Removal, ¶ 9, at p. 4, lines 5-22.

Defendant, however, makes a critical mistake in its simplistic analysis: the measure of damages in this case, as set forth in the seminal case of *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal.App.4th 663 (2nd Dist. 2006), is not measured by the total of Defendant's retail sales, the total of its gross profits relating to California sales, or even by 25% of its gross profits. *Id.* at 700 [Although the *Leatherman* case was remanded on appeal based on the absence of evidence to support the amount of restitution awarded, the trial court rejected as "'inequitable' a percentage of Leatherman's gross profits as an appropriate measure of either the unlawful benefit to Leatherman or the amount necessary to restore consumers to the position in which they would have been but for the unlawful conduct."]. The proper measure of damages is currently unknown and will be determined at time of trial based on presumably extensive expert opinion testimony in this regard.

As set forth in *Gaus*, the "bald" allegation that Defendant's "sales figures" for the spill

proof cups at issue in this case "exceeds $5,000,000" does not overcome the strong presumption against removal jurisdiction nor satisfy Defendant's burden of establishing the amount in controversy. *See, supra, Gaus*, 980 F.2d at 567 (9th Cir. 1992) (finding that defendant's bald recitation that the amount in controversy exceeded $50,000 without identifying any specific factual allegations or provisions in the complaint that might support that proposition, provoked *sua sponte* remand).

1. The Measure of Damages Is Not Defendant's Retail Sales Figures As It Relates to the Spill-Proof Cups

As set forth above, the *Leatherman* trial court rejected as "inequitable" a percentage of Leatherman's gross profits as the appropriate measure of either the unlawful benefit to Leatherman or the amount necessary to restore consumers to the position in which they would have been but for the unlawful conduct." *Id*. at 700. As such, Defendant's claim that the *higher* calculation of its retail sales figures is the appropriate measure of damages is incorrect, irrelevant and not dispositive of the amount in controversy issue.

Assuming, *arguendo*, that Defendant sold 6 million spill proof cups[1] with the false "MADE IN USA" designation to California consumers during the past four years at the average retail price of $6.99, then overall retail sales figure would be $41,940,000. Common sense dictates that most retailers include a markup of approximately 33%; as such, Defendant's *gross* proceeds from such sales would be $31,533,835.

The *Leatherman* court rejected a calculation of restitution at 25 percent of the average wholesale unit price per tool. Again, assuming, *arguendo*, that 10 percent would be the more appropriate restitution calculation in this case, the restitution amount would be limited to $3,1533,835 dollars in this litigation, which is far less than the jurisdictional threshold of $5 million dollars. This hypothetical calculation is demonstrative of the inherent difficulty that Defendant will have in presenting evidence to a "legal certainty" that damages exceed $5 million dollars in this case. As Defendant is the proponent of federal jurisdiction in this case, it has the

[1] Playtex submits it sold approximately 1,300,000 spill proof cups in California for the one year period of November 2006 through October 2007. Notice of Removal, ¶ 9, page 4, lines 15-17.

burden of establishing jurisdiction. *See Lowdermilk*, 479 F.3d at 997; *see Serrano v. 180 Connect, Inc., et al.*, 478 F.3d 1018 (9th Cir. 2007).

Simply stated, the Complaint alleges aggregate damages *less than* $5,000,000 and Defendant fails to establish to a legal certainty that damages exceed $5,000,000. Therefore, Plaintiff respectfully submits that this Court does not have subject matter jurisdiction over this matter.

E. The Longstanding Presumption Against Removal Continues After CAFA

It is clear that the courts strictly construe the removal statue against removal jurisdiction; especially in light of well established case law which dictates that plaintiff is the "master of her complaint" and can "plead to avoid federal jurisdiction" *Lowdermilk*, 479 F.3d at 998-99; *see Gaus, supra*, 980 F.2d at 566. There is a strong presumption against removal and if there is *any doubt* as to the right of removal, federal jurisdiction must be rejected. *Id.* This presumption is supported by principals of fairness and judicial efficiency, particularly when, as here, jurisdiction "rests on the defendant's own calculations of potential exposure under the plaintiff's claim." *Rodgers, supra*, 412 F.Supp.2d at 1175.

In this case, Defendant has not established that the amount in controversy exceeds $5,000,000. Defendant manufactured its own calculations as to what the damages are in this case, which is a measure of damages that is improper. Therefore, pursuant to holding of *Lowdermilk*, federal jurisdiction must be rejected.

IV. CONCLUSION

Based upon the reasons set forth above, Plaintiff respectfully requests that this Court issue an Order remanding this case back to state court for lack of subject matter jurisdiction.

Dated: November 13, 2007

Respectfully submitted,

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